STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 2002B043

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RODERICK BROWN.

Complainant,

VS.

DEPARTMENT OF CORRECTIONS, TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on January 22, February 27 and April 30, 2002 at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. After the parties filed written closing arguments, the record was closed on June 3, 2002. Assistant Attorney General Andrew Katarikawe represented Respondent. Respondent's advisory witness was Warden Juanita Novak, the appointing authority. Complainant appeared and was represented by Darol C. Biddle.

MATTER APPEALED

Complainant, Roderick Brown ("Complainant" or "Brown") appeals his termination by Respondent, Department of Corrections, Territorial Correctional Facility, ("Respondent" or "DOC"). Complainant seeks reinstatement, back pay and benefits.

For the reasons set forth below, Respondent's action is **affirmed**.

<u>ISSUES</u>

- 1. Whether Baca and Hatch's testimony should be stricken due to a violation of the sequestration order entered in this action;
- 2. Whether Complainant committed the acts for which he was disciplined;
- 3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 4. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

5. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

- 1. Complainant has been employed by DOC for sixteen years.
- 2. At the time of his termination, Complainant was a Correctional Officer IV, working as a shift commander with the title of captain at Colorado Territorial Correctional Facility ("CTCF"). He was assigned to the swing shift.
- 3. Shift commanders, during their assigned shift, are responsible for the welfare of the facility's staff and inmates, overseeing the work of the housing and security staff and running the facility during their shift. Included in a shift commander's duties is the task of counseling troublesome or unruly inmates.
- 4. Complainant is highly regarded by many of his subordinates who view him as a good officer.
- 5. Juanita Novak is the Warden for CTCF, a position she has held since November 2000.
- 6. Novak's duties include overseeing 670 inmates, 300 staff members, writing policies for the facility and acting as appointing authority for CTCF.

Complainant's Previous Disciplinary History

- 7. Complainant has had two disciplinary actions during his employment with DOC.
- 8. In 1997, Complainant wrote the word "rat," on a log, in between the first and last name of a John Tafoya from the Buena Vista Correctional Facility, who was signing in to CTCF for a training class.
- 9. Initially Complainant told the investigative staff from DOC's Inspector General's office ("IG") that he knew nothing about the incident. Approximately one week later, and prior to his pre-disciplinary meeting with his appointing authority, he contacted the investigators, recanted his original statement and told them that he had written the word on the log.
- 10. Complainant was disciplined by Warden McKinna for this incident with a one-week suspension without pay and ordered to write an apology to Tafoya. McKinna found that Complainant had violated DOC's Staff Code of Conduct and cautioned him to cooperate fully in future IG investigations and to provide a good example for his subordinate staff.

- 11. In August 1999, an inmate in segregation complained about not receiving his medication and had to be restrained when he became unruly.
- 12. Complainant instructed one of his staff members not to write a use of force report about the incident. He did this because he thought that if the report were written the inmate would receive additional segregation time.
- 13. Complainant was disciplined for this incident, receiving a 2.5 % reduction in his pay for one month. Warden Larry Embry took into consideration Complainant's past performance and the lack of intent on the part of the Complainant to cover up the actions of any staff member. Complainant was admonished for not adhering to DOC's incident reporting regulation and warned to adhere to DOC's regulations in the future and to model such behavior for his subordinate staff.

DOC Administrative Regulations

- 14. DOC has a regulation, Use of Force Options, Regulation No. 300-16RD, which covers the treatment of inmates, including the use of force against inmates. The sections of that regulation which are pertinent to this action are as follows:
 - a. Section I, <u>Policy</u> (B): "Nothing in this Administrative Regulation shall be deemed to constitute justification for reckless or criminally negligent conduct by a staff member."
 - b. Section II, <u>Purpose</u>: The purpose of the Administrative Regulation is to provide direction and reasonable force options for correctional staff in the lawful performance of their duties.
 - c. Section IV (A)(1): In no event is physical force justifiable as punishment.
 - d. Section IV (A)(2): Use of physical force is restricted to instances of justifiable self-defense, protection of others, protection of property, implementation of lawful orders, and prevention of escapes, and then only as a last resort and in accordance with appropriate statutory authority.
 - e. Section IV (A)(6)(a): Staff shall conduct themselves professionally when managing an offender and shall avoid any personal reprisal when controlling an offender by use of force.
 - f. Section IV (C): All staff who have knowledge of or respond to any use of force, regardless of degree of force, must immediately report the use of force incident to their supervisor and complete a facility incident report before the end of the shift.

- 15. DOC has a regulation, Staff Code of Conduct, Regulation No. 1450-01, which covers the overall conduct of DOC's staff. The sections of that regulation which are pertinent to this action are as follows:
 - a. Section IV (B): Excessive physical force or verbal abuse of offenders by staff will not be permitted nor will physical/verbal force be used beyond that necessary to control an offender or to enforce legitimate and legal commands.
 - Section IV (U): Staff will not engage in actions of corruption, bribery, indecent or disorderly conduct nor will staff condone such acts by other staff
 - c. Section IV (Y): Staff shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation.
 - d. Section IV (Z): during the course of an official investigation, staff shall cooperate fully by providing all pertinent information which they may have. Full cooperation involves responding to all questions and providing a signed statement or affidavit if requested.
 - e. Section IV (BB): Staff shall not interfere with any legal investigation or fact-finding process, nor with the operation of any other work unit of DOC. Staff are prohibited from attempting to hinder or influence in any manner the testimony or information to be given by any witness or potential witness in an investigation or administrative proceeding.
 - f. Section IV (ZZ): Any act or conduct on or off duty, which affects job performance and which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.
- 16. All DOC employees receive training in the above regulations. The regulations in effect at the time of the R-10 meeting were applied and were substantially similar to those in effect at the time of the incidents that were the subject of the disciplinary action against Complainant.

Simpson Incident

- 17. On March 18, 2001, approximately one hour before the shift change, Inmate Alan Simpson was being unruly and using profanity. Simpson was ordered a couple of times to present his hands so that he could be handcuffed. After a few minutes he was handcuffed behind his back while he was in his cell, escorted to an empty office and seated in a chair across from a desk.
- 18. Present in the office were Complainant, Sergeant Williams, Sergeant Baca, Baldwin, Smith and Simpson.

- 19. Complainant was the last person to enter the room. When he entered, Simpson was using profanity, slouching in his chair and saying he did not care what was done to him. Complainant seated himself on the edge of the desk, in front of Simpson. Baca was seated on a corner of the desk, across from Simpson.
- 20. Complainant told Simpson to remove the smirk from his face. When Simpson said nothing, Complainant walked up to him, put his (Complainant's) hands on either side of Simpson's face and, using his right fist, Complainant hit Simpson on the side of his head. When Complainant moved towards Simpson, Baca bent over and moved forward to hold down Simpson's knee.
- 21. After he was struck, Simpson began to move his head around. Complainant then said "how about this," and using both hands, slapped Simpson on both sides of his face.
- 22. Complainant told Simpson that the next time he would pop his eye out and asked him if he was going to give them any more problems, to which Simpson replied "no."
- 23. Simpson was then uncuffed and escorted back to his cell.
- 24. While in the office, Simpson offered no physical resistance.
- 25. Complainant told Baldwin, Williams, Baca and Smith that since Simpson was not going to isolation, they would not need to prepare incident reports.
- 26. At the end of the shift, while Baldwin was turning in his equipment, Officers Root and Smith were present. Smith said, "you don't rat out an officer or you are screwed." Smith and Root then turned and looked at Baldwin.
- 27. Williams prepared the only Incident Report on the Simpson incident. It stated, in part, "Captain Brown arrived at CH-5 with additional Yard staff and counseled inmate Simpson. Inmate Simpson gave staff his word that he would discontinue the facility disruption and would not be a management problem."

Chavez Incident

a. The Shank

- 28. On April 10, 2001, an officer in a control tower reported that he had observed Inmate Chavez burying something in the yard at CTCF.
- 29. Officer DeWees went to the yard and, within twenty minutes, had dug up a homemade knife, referred to as a "shank," which was nine inches long and had a wooden handle and a rod with a sharpened point.
- 30. The shank had been given to Chavez by his fellow gang members for safekeeping.

Shanks are contraband and pose a serious threat to the health, safety and welfare of DOC employees and/or inmates.

- 31. DeWees then contacted Chavez' cell house and told them to bring Chavez to the first level of the cell house.
- 32. It took fifteen to twenty minutes for the CTCF officers to locate Chavez. When they did find him, DeWees and Smith searched him and handcuffed him. During the search Chavez did not complain about being hurt.
- 33. DeWees and Smith escorted Chavez to Complainant's office.

b. Meeting between Complainant and Chavez

- 34. When Complainant arrived at his office, Chavez was standing outside with Baca, DeWees, Smith and Borella.
- 35. DeWees then left to write his report and place the shank in a secure location. Smith returned to his post from which vantage point he could see Complainant's office door.
- 36. Complainant took a hold of the front of Chavez' shirt, lead him into Complainant's office and sat him in a chair.
- 37. After the interview, Smith and Borella escorted Chavez to the Segregation Unit in Cellhouse 3.

c. Segregation

- 38. Immediately upon arriving in the Segregation Unit, all inmates are strip searched for contraband. During this search the inmates' orifices and their clothing are searched. Such a search would include a search of an inmate's ears and the use of a flashlight rather than a medical scope.
- 39. While in the Segregation Unit, inmates have no contact with each other and the officers make rounds approximately every thirty minutes.
- 40. Officers Wiseman and Bumgarner strip-searched Chavez when he arrived at the Segregation Unit and prior his being placed in a cell. Bumgarner searched Chavez' body and Wiseman searched his clothes.
- 41. Neither Wiseman nor Bumgarner saw anything wrong with Chavez during this search.
- 42. Smith and Borella were present while Chavez was being searched.

- 43. After Chavez was searched, he was placed in a cell that had also been searched. Soon after being placed in this cell, Chavez spoke to an officer making rounds on Chavez' tier and requested medical treatment. Wiseman relayed the request to his supervisor, Lieutenant Cohagen.
- 44. Cohagen stopped Smith and Bumgarner as they were leaving Cellhouse 3 and asked them if there was any reason not to send Chavez to the infirmary. Both officers replied that, "nothing happened."
- 45. Cohagen then called Complainant, who was the shift commander, and told him that he was sending Chavez to the infirmary. Complainant, Baca and a new Nurse III who was being given an orientation by Baca came down to see Chavez.
- 46. First Complainant spoke to Chavez alone in an office. The new nurse then stepped into the office, then came out saying he could not do an examination in the office and would need to have Chavez sent to the infirmary.
- 47. Chavez was escorted to the infirmary where he was examined at approximately 7:15 p.m. The notations by the nurse state that Chavez had a small amount of bloody drainage from his ear.
- 48. After he came back from the infirmary Chavez continued to complain that his ear still hurt. This time Lieutenant Cohagan arranged for Chavez to be escorted to the infirmary without contacting Complainant.
- 49. Chavez was examined at the infirmary at approximately 9:00 p.m. The notations by the nurse state that Chavez' left ear continued to have a small amount of blood. He was given some pain medication and his ear was treated.
- 50. Later in the evening when Cohagen made his rounds, Chavez was sleeping in his cell.
- 51. The next day, on April 11, 2001, Chavez was again examined at 1:20 p.m., this time by Nurse Practitioner Alessi. Alessi's notes state that it was difficult to get a visual inside Chavez' ear because of the blood. That blood was approximately twelve hours old. Chavez told her a staff member had struck him on the side of the head. Chavez was again given pain medication. Alessi's notes further state that perforation of the eardrum is suspected.
- 52. Later on April 11, 2001, Complainant called Cohagen and asked him to bring Chavez to Complainant so that Complainant could talk to Chavez.
- 53. Complainant talked to Chavez for five or ten minutes, alone, in an office. During that time Cohagen was outside the door of the office and did not hear anything. When Complainant opened the door, Chavez was crouched in the corner, shaking and looking

- scared. Cohagen and the other officer then escorted Chavez back to his cell.
- 54. On April 25, 2001, Dr. C. Scott Howe examined Chavez. His notes state that Chavez sustained a marginal perforation and was "fairly intolerant to eardrops that were instilled."
- 55. Approximately fifteen days after the incident, Howe examined Chavez and found that he had sustained a 30-decibel loss in his ear.
- 56. As a result of the Simpson and/or Chavez incidents, Complainant has criminal charges pending against him. In addition, Chavez has filed a federal lawsuit against Complainant and the State of Colorado.

IG's Investigation of the Chavez and Simpson Incident

a. Chavez Investigation

- 57. On April 12, 2001, Lieutenant Tom Benneze, the intelligence officer for CTCF told Novak that while he was interviewing Chavez about the shank, Chavez stated that he had been slapped across the face and his eardrum was ruptured. Novak referred the matter to the IG's office.
- 58. Inspector Hatch of the IG's office was assigned to investigate the Chavez incident.
- 59. During the course of his Chavez investigation Hatch spoke to a number of correctional officers and medical personnel treating Chavez, including Complainant, DeWees, Baca, Howe, Nurse Practitioner Alessi and Nurse Westerledge.
- 60. Initially, in the Chavez investigation, Baca stated that he was <u>not</u> in the room with Complainant and Chavez.
- 61. Later in the Chavez investigation, Baca stated that he <u>was</u> in the room with Complainant and Chavez but, when Complainant approached Chavez, because the atmosphere was uncomfortable, he did not look at Chavez and, therefore did not see Complainant hit Chavez. However, Baca stated that he did hear the sound of a slap.
- 62. During the Chavez investigation, at the request of the IG investigators, Hatch and McLaury, Baca placed a call to Complainant that was taped. During the conversation, Baca told Complainant that he had not seen Complainant hit Chavez. Complainant asked Baca if he had still "gone" with "nobody was in the room." Baca explained that he had initially said that he wasn't in the office but had now told them that he was in the office. Complainant commented, "we actually should of stuck with the same story, cause they didn't have nothin' before." Complainant then said he needed to call one of the other officers to let them know what was going on.

- 63. Fifteen minutes later, Complainant called Baca back. He asked Baca if he had said that anyone else was in the room and if he (Baca) had seen Complainant hit Chavez. Baca said he had told them that he thought there were others in the room but he didn't know whom and that he had not seen Complainant hit Chavez. Complainant then stated that he needed to "talk to the other fellows."
- 64. At the conclusion of his Chavez investigation, Hatch prepared a report that Novak reviewed.

b. Simpson Investigation

- 65. In July 2001, while the IG's office was investigating the Chavez incident, Baldwin reported the Simpson incident to Major Steve Hagar. Hagar, in turn, reported Baldwin's statement to Novak who referred the matter to the IG's office for investigation. The matter was assigned to Hatch for investigation.
- 66. After reporting the Simpson incident, Baldwin requested a transfer from CTCF to another DOC facility. When a Correctional Officer I position came open at another facility, Baldwin put a great deal of effort into the interview and was, eventually, awarded the position.
- 67. Baldwin did not initially report the Simpson incident because of Complainant's instruction to him and other officers not to prepare an incident report. In addition, he viewed Complainant as a good officer.
- 68. Baldwin ultimately reported the incident for two reasons. When he told Officer Johnson, with whom he carpooled, about the incident, Johnson told him that keeping it to himself would be a felony. In addition, his peers at CTCF were ostracizing Baldwin and his work environment was very uncomfortable.
- 69. After interviewing Baldwin, Hatch interviewed Simpson who confirmed everything that Baldwin had reported. In addition, Simpson told Hatch that he had written a letter to Tara Zupan, his girlfriend, at the time of the incident and told her about being hit by one of the officers.
- 70. Hatch obtained, from Zupan, a copy of Simpson's letter that outlined the incident with Complainant.
- 71. Hatch interviewed Simpson and a number of officers present at the Simpson incident, including Complainant, Williams, Baca, Smith and Baldwin. Smith did not remember the incident, even after viewing a picture of Simpson. Williams did not recall the incident. Baca remembered only portions and Complainant denied that he struck Simpson.
- 72. At the conclusion of his Simpson investigation, Hatch prepared a report that Novak

reviewed.

R-6-10 Meeting and Disciplinary Action

- 73. Novak received two reports from the Inspector General's office, one on the Chavez incident and one on the Simpson incident. After reviewing those reports she gave Complainant notice of the R-6-10 meeting to discuss violations of DOC's administrative regulations on the Staff Code of Conduct and Use of Force.
- 74. On or about October 24, 2001, Novak held the R-6-10 meeting with Complainant.
- 75. Present at the R-6-10 meeting were Novak, Madeline Sabell (DOC's Director of Human Resources), Complainant and Complainant's attorney, Darol Biddle. Prior to the R-6-10 meeting Biddle requested, but was refused, copies of the two reports from the IG's office.
- 76. Because Complainant was refused copies of the IG's reports, Biddle instructed him not to discuss the incidents with Novak at the R-6-10 meeting.
- 77. The R-6-10 meeting covered both the Chavez and Simpson incidents. During that meeting, Novak discussed with Complainant the regulations that he was alleged to have violated.
- 78. At the time of the R-6-10 meeting, Complainant had criminal charges pending against him; therefore, he did not want to discuss the incidents at that meeting. He simply stated that things were not as they seemed.
- 79. In considering whether Complainant had violated DOC's use of force regulations, Novak applied the administrative regulations in effect at the time of the R-6-10 meeting.
- 80. Prior to reaching her decision to terminate Complainant, Novak considered Complainant's years of service, his supervisory position and his past training in the use of force.
- 81. Novak considered a range of alternatives for disciplining Complainant, including a temporary reduction in pay, demotion or termination.
- 82. Novak decided not to reduce Complainant's pay or demote him because it would not affect Complainant's behavior or stop the cycle of violence towards inmates.

- 83. Novak determined that termination was the only appropriate discipline for Complainant in light of various factors, including:
 - Complainant's position as a supervisor and trainer;
 - the serious nature of the incidents:
 - subordinate officers witnessed the Simpson incident;
 - Complainant's direction to subordinate officers not to write a report at all in the Simpson incident and to write an incomplete report in the Chavez incident; and
 - His failure, as shift commander, to write a report on either incident.
- 84. On October 29, 2001, via certified mail, Novak notified Complainant that she was terminating his employment with DOC for violating DOC's AR 300-16RD, Use of Force Options, Sections I (B) and II; IV-A(1); (2); and (6)(a) and AR 1450-1, Staff Code of Conduct, Sections IV (B); (U); (Y); (Z); (BB); and (ZZ).

Officer Mark Baldwin and Sergeant Rudy Baca's Credibility

- 85. Officer Mark Baldwin testified that Complainant struck Simpson. The Administrative Law Judge finds that Baldwin's testimony is credible. In making this finding, the Administrative Law Judge has considered the following factors, <u>among others</u>:
 - a. The incident was independently corroborated by Simpson who had not, until interviewed by the IG investigators, discussed the incident with any DOC officials;
 - b. Simpson's letter to Tara Zupan, written soon after the incident and describing the incident generally;
 - c. The few details provided by Baca corroborate Baldwin's version of the incident.
- 86. Sergeant Baca testified, under oath, on the first day of hearing that he was in the room with Complainant and Chavez and turned away when Complainant approached Chavez because he was uncomfortable with the atmosphere in the room. On the second day of hearing Baca, under oath, recanted his previous sworn testimony and testified that he had witnessed Complainant strike Chavez. During the investigation Baca told Hatch different versions of what transpired with Chavez, initially stating that he was not present in the room and eventually stating that he was in the room but did not see anything. The Administrative Law Judge finds that Complainant's testimony with regards to the Chavez incident is not credible. In making this finding, the Administrative Law Judge has considered the following factors, among others:
 - a. The different versions of what Baca witnessed with regards to the Chavez incident, at least two of which were under oath;

- b. The lack of any corroborating witnesses for any of the various versions Baca has made regarding the Chavez incident;
- c. His weakness and fluctuation of memory throughout the Chavez investigation; and
- d. His evasive demeanor while testifying regarding the Chavez incident.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

A. <u>Burden of Proof and Credibility Determinations</u>

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness' testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). In making credibility determinations, the administrative law judge is guided by the factors set out in CJI 3:16, which include: the witnesses' means of knowledge, strength of memory and opportunities for observation, the reasonableness or unreasonableness of their testimony, their motives, whether their testimony has been contradicted, any bias, prejudice or interest, and their manner or demeanor on the witness stand.

II. HEARING ISSUES

A. Baca violated the sequestration order but there was no harm shown from that violation.

Complainant argues that because one of the witnesses, Baca, violated a sequestration order entered in this action, the testimony of both Hatch and Baca should be stricken. Respondent argues that no prejudice occurred as a result of the violation of the sequestration order.

On the first day of hearing, a sequestration order was entered. Prior to being sworn in, each witness, including Baca, was informed by the administrative law judge of the sequestration order. Baca testified on the first day of hearing that he was not looking at Chavez when Complainant approached him and therefore did not see whether or not Complainant hit Chavez. Sometime after the first day of hearing Baca told Novak that he had not told the truth while testifying in this personnel action. Novak referred Baca to Hatch. Hatch then instructed Baca to prepare a report regarding his false testimony.

When Baca spoke to Novak, she had already testified. Hatch testified after speaking to Baca. There was no evidence presented that Baca's statements affected, in any way, the testimony of either Novak or Hatch. As stated before, Novak had already testified. Hatch testimony consisted solely of his investigation of the Chavez and Simpson incidents, prior to Complainant's R-6-10 meeting. Hatch's testimony consisted of what various people told him when he interviewed them during those investigations. He testified as to what Baca stated during that investigation – that he was in the room with Complainant and Chavez but looked away. There was no evidence presented that Baca's violation of the sequestration order in some way altered Hatch's subsequent testimony.

Complainant's motion to have Baca and Hatch's testimony stricken is **denied**.

B. Complainant committed the acts for which he was disciplined.

Complainant was disciplined for violating DOC's administrative regulations on use of force against inmates and the Staff Code of Conduct. In defense, Complainant states that he did not strike and/or threaten either Simpson or Chavez nor did he impede the IG's investigation. In addition, Complainant argues, any force that was used was allowed under §18-1-703(1)(b), C.R.S.

1. Violations of Use of Force

Section 18-1-703(1)(b), C.R.S. provides:

- (1) The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:
 - b) A superintendent or other authorized official of a jail, prison, or correctional institute may, in order to maintain order and discipline, use reasonable and appropriate physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious bodily injury.

DOC's regulations provide that excessive use of force is not permitted, nor is it to be used beyond that force which is necessary to control an inmate. The regulations go on to state that force is not to be used as punishment or personal reprisal and may only be used in those cases involving self-defense, protection of others or property, to implement orders or to prevent escapes. DOC AR 300-16RD, Section IV (A)(1), (2) and (6)(a) and AR 1450-1, Section IV(B).

Simpson was handcuffed behind his back and seated in a chair when Complainant hit him on the side of his head, at least twice, and threatened him with the loss of his eyesight. There was no evidence presented that Simpson needed to be controlled any further nor that it was one of those instances in which use of force is allowed, including self-defense, protection of others or property, implementation of orders or prevention of an escape.

Simpson was already physically restrained and was not demonstrating aggressive or threatening behavior when Complainant struck him. Simpson had been brought under control – he was handcuffed behind his back, seated and surrounded by officers. There was no indication that it was necessary for Complainant to threaten Simpson with the loss of his eyesight in order to restrain him. Respondent has shown that Complainant used an excessive amount of force against Simpson and thus violated DOC's administrative regulations on use of force.

Section 18-1-703(1)(b), C.R.S. does not provide a safe haven for Complainant and his actions. The language of that statute provides that the force must be reasonable and appropriate. As set forth above, such was not this case in the Simpson incident.

There was conflicting evidence as to whether Complainant struck Chavez during their meeting or whether Chavez' fellow inmates and gang members at CTCF assaulted him as a result of the shank being discovered. The theory that Chavez was assaulted by his fellow inmates is only supported by rumor. Baca was the only person who gave eye witness testimony supporting the theory that Complainant assaulted Chavez. Both

Complainant and Chavez' fellow inmates had the opportunity to assault Chavez. Complainant would have had an opportunity during his meeting with Chavez. The inmates would have had an opportunity during the time period between when the officer in the control tower spotted Chavez burying the shank and when Chavez was picked up by DOC's officers and taken to the meeting with Complainant. Chavez began to complain, at the latest, when he arrived in Segregation Unit. The timing of his complaint would support either of the aforementioned theories.

As noted above, Respondent bears the burden in this disciplinary matter. Given the finding on Baca's credibility and the lack of substantive evidence to prove that Chavez received his ruptured eardrum injury from Complainant, Respondent has failed to present credible evidence to show that Complainant used excessive force against Chavez.

Complainant violated DOC's administrative regulations governing the use of force against inmates with regards to the Simpson incident.

2. Violations of Staff Code of Conduct

DOC's Staff Code of Conduct provides that its staff is to behave with integrity during the course of its official duties and when taking part in an investigation, not interfere with or hinder any official investigations, not influence witnesses in an investigation nor engage in conduct that affects job performance or reflects poorly on an individual. DOC AR 1450-1, Section IV (U); (Y); (Z); (BB); or (ZZ).

The Simpson incident occurred in front of subordinate officers. In addition, Complainant instructed those same subordinate officers not to write reports on the incident. Complainant was a supervisor for all of the officers present during the Simpson incident. As such he set the tone for the professional behavior of the staff working at CTCF during his shift. His violation of the administrative regulations governing use of force and his instructions to his subordinates not to write reports on that incident were acts which showed a lack of integrity and affected his job performance. As such they violated DOC's Staff Code of Conduct.

During the investigation of the Chavez incident, Complainant's comments in his taped conversations with Baca imply that a story has been concocted, with Complainant's knowledge and involvement, that no one was in the room and no one saw anything. He then goes on to say that he needs to talk to the other officers about Baca's conversation with the IG's office. A few minutes later he calls back to confirm what Baca has said to the IG's investigators and, once again, states that he (Complainant) needs to talk to the other officers.

Complainant's taped conversations with Baca during the investigation imply efforts on Complainant's part to influence witnesses and, therefore, hinder the IG's investigation. They imply that Complainant is coordinating, behind the scenes, the various witnesses' stories. His references to "going" with the same story and sticking with that story because

before that they didn't have "nothin" to go on, indicate that Complainant was using his influence with his subordinates to impede the progress of the IG investigation. Such conduct violated DOC's Staff Code of Conduct.

In conclusion, Respondent has shown that Complainant violated DOC's administrative regulations on the use of force in the Simpson incident and the Staff Code of Conduct in both the Chavez and Simpson incidents. By doing so he committed the acts for which he was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

Both the Simpson and Chavez incidents were investigated by Hatch from the IG's office. After completing those investigations, Hatch prepared written reports on each incident. Novak reviewed those reports prior to imposing disciplinary action against Complainant. In the course of completing the investigations, Hatch interviewed various witnesses involved in each incident. While neither of those reports was offered into evidence, there was no credible evidence that Hatch failed to interview any witnesses or to obtain any relevant evidence.

Prior to imposing discipline, Novak reviewed Hatch's reports and conducted an R-6-10 meeting with Complainant. Given the pending criminal charges against Complainant and upon the advice of counsel, Complainant did not provide Novak with an explanation of what occurred during either of the incidents. He simply stated that things were not as they seemed. There was no substantive evidence provided that Novak failed to consider any of the evidence in the investigative reports or that she failed to consider any information provided to her by Complainant.

Novak ultimately concluded that Complainant had used excessive force in both the Simpson and Chavez incidents. In doing so, she exercised her discretion in a reasonable manner. In the Simpson matter, there was independent corroboration from two witnesses, Baldwin and Simpson. The details that Baca did testify to substantiated the more complete statements of Baldwin and Simpson. In addition, Simpson's letter to Zupan further corroborated the witnesses' statements

In the Chavez incident, Novak was presented with evidence of Chavez' complaints and his trips to the infirmary. Even more importantly, Baca, at the time of the investigation, stated that while he was not looking at Chavez he did hear a slap. Her decision that Complainant struck Chavez was rationally based.

Finally, there was no credible evidence of dissimilar discipline being imposed for like instances - instances in which a supervising officer struck or threatened an inmate who was handcuffed and restrained.

Employees may be disciplined for failing to follow departmental rules. Board Rule R-6-9, 4 CCR 801. As set forth above, Complainant violated DOC's administrative regulations concerning the use of force and the Staff Code of Conduct. Therefore, under the state personnel rules, he could be disciplined.

Novak did not act arbitrarily, capriciously or contrary to rule or law in disciplining Complainant.

D. The discipline imposed was within the range of reasonable alternatives

The weight of the evidence showed that Novak considered a range of reasonable alternatives with regards to the discipline to be imposed against Complainant. She considered temporary reduction in pay and demotion, in addition to termination. Prior to reaching her decision, Novak also considered Complainant's years of service to DOC, his supervisory and training role at CTCF and his past training in the use of force against inmates.

However, Complainant's supervisory position, his function as a trainer for subordinate officers and the serious nature of the circumstances were all aggravating factors. These factors were further exacerbated by the fact that Complainant's actions, at least in the Simpson case, were witnessed by subordinate officers and he directed those same officers not to write reports on the Simpson incident. Ultimately there was no report written, other than the report by Williams that Complainant "counseled" Simpson. There was a great deal of testimony from many witnesses that Complainant was a good officer and well respected. However, given this respect and Complainant's role as a supervisor and mentor, his actions and statements possibly had a greater impact upon his subordinates.

It should also be noted that Complainant was disciplined in the past for failing to prepare a report on a use of force incident. Complainant was aware of the importance of preparing such reports. Yet in the Simpson incident, at least, Complainant instructed his subordinates to violate DOC reporting requirements. In the prior incident Complainant received a reduction in pay. Given the more serious nature of the Simpson incident, Complainant's personal involvement in meting out the use of force in the Simpson incident and his instruction to his subordinates not to report the incident, termination was within the range of reasonable alternatives.

The credible evidence demonstrates that the appointing authority pursued her decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Neither party presented credible evidence that this was such an action. Given the above findings of fact an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

- 1. Baca violated the sequestration order but there was no harm shown from that violation.
- 2. Complainant committed one of the acts for which he was disciplined.
- 3. The discipline imposed was within the range of reasonable alternatives.
- 4. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
- 5. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed.** Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 17th day of July, 2002.

Kristin F. Rozansky Administrative Law Judge 1120 Lincoln Street, Suite 1420 Denver, CO 80203 303-894-2136

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on $8 \square$ inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

· — · ·	of July, 2002, I placed true copies of the foregoing TIVE LAW JUDGE and NOTICE OF APPEAL age prepaid, addressed as follows:
Darol C. Biddle, Esq. 323 S. Union Avenue Pueblo, Colorado 81003	
and in the interagency mail, to:	
Andrew Katarikawe Assistant Attorney General Employment Law Section 1525 Sherman Street, 5 th Floor Denver, Colorado 80203	
	Andrea C. Woods